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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1134

MARIO RAINONE and ROCCO CIRCELLI,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

GEORGE B. COLLINS
One North LaSalle Street
Chicago, Illinois 60602
(312) 372-7813
Attorney for Petitioner, Rocco Circelli

ROBERT E. SCHULZ
35 East Wacker Drive
Chicago, Illinois 60601
(312) 782-7731
Attorney for Petitioner, Mario Rainone

Midwest Law Printing Co., Chicago 60601, Financial 6-3988

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Mario Rainone and Rocco Circelli, by their attorneys, petition for writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The memorandum opinion filed by District Court Judge Hubert Will granting Defendant's motion to suppress was rendered on June 21, 1978. (App. A, pp. 1a-7a).

The opinion of the United States Court of Appeals has not, as yet, been officially reported. The opinion of the Court of Appeals rendered on November 9, 1978, is at App. B, pp. 8a-16a. The order denying the Petition for Rehearing was entered on December 19, 1978 (App. C, p. 17a). The order granting Petitioners' Motion for Stay of Mandate Pending Application for Certiorari was entered on December 26, 1978 (App. D, p. 18a).

JURISDICTION

The order denying the Petition for Rehearing was entered on December 19, 1978 (App. C, infra, p. 17a). The Petition for Certiorari is being filed within thirty days after the entry of said order. Jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

1. Should *Terry v. Ohio*, 392 U.S. 1, be expanded to allow a warrantless search of an automobile after a "stop and frisk" has revealed no weapons and no probable cause to believe a crime has been committed.

2. Should a police officer be allowed to continue a detention after his "Terry frisk" has revealed that the subject is unarmed and not involved in criminal activity.

3. May a "Terry frisk" of the outer clothing of a subject be extended to the automobile from which the subjects have been removed.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Fourth Amendment:

> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized."

STATEMENT

Judge Will, in his memorandum opinion, (App. A, infra, pp. 1a-2a) summarized the pertinent facts. Defendants were stopped, ordered out of their car after a brief interrogation through the open windows of a car. They were searched; nothing was found, and a determination was made by the officers to release the Defendants. Before allowing them to re-enter the car, the officers searched under the front seat and, without seeing it first, found a bomb. Judge Will asked the officer why he searched the car; the officer said:

> "As a matter of routine, Sir, before putting them back in the car." (Tr. 77).[1]

A rumor of a family feud, between certain relatives of Defendant Rainone, was mentioned, but this was not the justification of the officer:

> "Mr. Collins: Would you have made the search . . . in fact, you already decided to make the search whether or not Mr. Stack told you that there were intra-family problems within that family.
>
> "The Court: I assume he would have made the search, having stopped them, having frisked them, he would have made the search whether or not there was any family problems.
>
> "The Witness: Right." (Tr. 84)

The trial court granted Defendants' Motion to Suppress Evidence. Judge Will ruled that he could not expand the *Terry* doctrine to cover the search, made after a determination not to arrest. The Government, pursuant to Title 18, U.S.C. § 3731, appealed the order to suppress to the Seventh Circuit Court of Appeals. The Court of Appeals reversed and held that the *Terry* case, as presently viewed, would permit a search after a determination is made to release the Defendants.

[1] Transcript of suppression hearing held April 14, 1978.

ARGUMENT

IT IS CONSTITUTIONALLY IMPERMISSIBLE FOR A POLICE OFFICER TO STOP AND FRISK A SUSPECT WHEN THE OFFICER DID NOT BELIEVE THAT THE SUSPECT WAS ARMED AND PRESENTLY DANGEROUS.

This case represents an important extension of the *Terry* doctrine. That doctrine has now been expanded from a pat-down of the outer clothing being worn by a suspect to the search of a car in which the suspect is not sitting after it is determined that there is no probable cause to arrest.

We contend that this expansion of the rule is important, and should be reversed. If followed, this decision will allow the search of almost any automobile after any stop in which an outer-clothing pat-down can be justified. We contend that this search of the car is not one of those "specifically established and well delineated exceptions" to the requirement of probable cause of a warrant. *Coolidge v. New Hampshire*, 403 U.S. 443, at 455.

This exception created in *Terry v. Ohio*, 392 U.S. 1, allows a search in the absence of probable cause or a valid arrest when, in the context of a "police seizure" the police officer has an articulable reason to believe that a search is necessary for his own safety.

This exemption was granted in guarded language in the *Terry* case (392 U.S. at 30):

> "We merely hold today that where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and

> presently dangerous, where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries, and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or other's safety, he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him."

The *Terry* case did *not* hold that the search could continue after the officer had determined that there was no probable cause. And, the absence of probable cause indicates that there are no "specifically articulable facts" upon which a continuing search could be based. See *Sibron v. New York*, 392 U.S. 40 (1968); *U.S. v. Brignoni-Ponce*, 422 U.S. 873 (1975).

An officer may use the *Terry* exception if he has some articulable fears of the subject, but the standard used for determining reasonable "fear" is an objective one. *Terry v. Ohio*, supra, at 21-22. Our record is void of any objective act by any of the officers involved which indicates that they were, in fact, in fear of anything. The officers did not stop their squad car further away from Defendants' car than would be normal; they did not order the Defendants out of their car via their cruiser's public address system, and none of the officers ever put a hand on his gun. These three actions are objective indications of a lack of fear. See *United States v. Green*, 465 F.2d 620 (D.C. Cir. 1972).

The police should not be allowed to search anyone based on the fact that, at some previous time, there was an articulable suspicion, unless the suspicion continues.

The other view, as expressed by the Court of Appeals, opens the way for enormous expansions of police power

over persons in automobiles. Perhaps it is time for this expansion; but, if it comes, it should be by a judgment of this Court.

Automobile searches without warrants do not invariably result in motions to suppress. Many such searches occur which have as their only result an increase in the bad feeling which so often exists between peace officers and the people. We submit that the circumstances under which an automobile may be searched is a question of great public importance, and the boundaries within which such searches may occur should be, now, clearly defined.

II.

IF A STOP AND FRISK SEARCH OF SUSPECTS RIDING IN AN AUTOMOBILE TURNS UP NOTHING INCRIMINATING, IT IS IMPROPER FOR A POLICE OFFICER TO EXTEND THE SEARCH TO THE AUTOMOBILE FROM WHICH THE SUSPECTS HAVE BEEN REMOVED.

Even though both Defendants were frisked and nothing incriminating was found, the officers commenced to search the automobile in which they had been riding. This was done after the officers decided that there was no probable cause for arrest or further search. The Court of Appeals justified this further search of the automobile as falling within the permissible scope of a *Terry* protective search. Although the Court cited no precedent specifically allowing such an extension of the permissible scope of a protective search, it cited two cases as persuasive authority for the extension of *Terry*, *United States v. Green*, 465 F.2d 620 (D.C. Cir. 1972), and *United States v. Wilkerson*, No. 77-1932 (D.C. 7/26/78). Neither of these cases, nor any decisions of this Court, warrant such an extension of *Terry*.

In *Green*, the Court analyzed the legality of the search on the basis of a protective search incident to an arrest. The officers were in fear, made an arrest, and searched incidental to that arrest.

In *Wilkerson*, the defendant's automobile was stopped, a reasonable suspicion of a crime in progress existed. Defendants were ordered out of the car. The officer saw a suspicious jacket in plain view on the front seat which appeared to be wrapped around something. The Court states on pages 8-9:

> "There is no indication that Officer Wooten stepped into the car; he merely looked, reached, patted, and found weapons."

In the case at bar, the intrusion was much more serious with far less objective cause. Facts in the case at bar are much more analogous to those in the case of *Tyler v. United States*, 302 A.2d 748 (D.C. Cir. 1977) a case cited in *Wilkerson* and in which the Court found the search to be an extension not contemplated within *Terry* and therefore unlawful.

We submit that, because this search had a result, the Court of Appeals expanded *Terry* to justify that result. But, see *Mapp v. Ohio*, 367 U.S. 643, 660. But, this was no protective search; it was a "routine" search, without a warrant, without probable cause, and after exhaustion of the *Terry* purpose which Judge Will believed validated the initial frisk of the Defendants. The Fourth Amendment is designed to prevent, not simply to redress, unlawful police action. *Chimel v. California*, 395 U.S. 752 at 768. Only by protecting these Defendants can other citizens avoid being searched because it is "routine."

An individual's fundamental right regarding his freedom from unreasonable search and seizure is much

narrower when traveling in the Seventh Circuit than when traveling in any other Circuit in the United States. Rights as fundamental as those guaranteed in the Fourth Amendment should be uniform throughout the United States. Any extension of a doctrine which restricts fundamental liberties, should, we respectfully submit, only be expanded by this Court.

CONCLUSION

The writ of certiorari should, we submit, be granted.

Respectfully submitted,

GEORGE B. COLLINS
One North LaSalle Street
Chicago, Illinois 60602
(312) 372-7813
Attorney for Petitioner, Rocco Circelli

ROBERT E. SCHULZ
35 East Wacker Drive
Chicago, Illinois 60601
(312) 782-7731
Attorney for Petitioner, Mario Rainone

APPENDIX

APPENDIX A

(District Court Opinion Of June 21, 1978)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 78 CR 33

UNITED STATES OF AMERICA,

Plaintiff,

v.

ROCCO CIRCELLI and MARIO RAINONE,

Defendants.

MEMORANDUM OPINION

On February 16, 1978, defendants were indicted for possession of an unregistered destructive device, a dynamite bomb, and conspiracy to damage and destroy a restaurant doing business as Mario's Pizza, in violation of 26 U.S.C. § 5861(d) and 18 U.S.C. § 371. Defendants have filed motions to suppress the entry into evidence of the bomb, pursuant to which we held an evidentiary hearing and requested post-hearing briefs. For the reasons herein stated, we grant the motions to suppress.

I.

On January 17, 1978, at approximately 3:00 a.m., DuPage County Deputy Sheriffs David Swanson and Dennis Guzlas were driving south on a side street approaching the intersection of Routes 59 and 38 in West Chicago, enroute to a coffee break. The officers observed a car proceeding very slowly eastbound through a parking lot next to Mario's Pizza with its headlights off. The pizza parlor was closed and there were no lights on in the parking lot, although there was

some illumination from a nearby used car lot. The officers turned their squad car into the parking lot so that it faced the suspect vehicle and focused the squad's spotlight on it. They were followed in by a West Chicago police car driven by Officer Gene Stack, which happened to be cruising in the area. Officer Stack walked to the driver's side of defendants' car while Officer Guzlas went to the passenger side. Officer Swanson stood at the right rear of the car. Defendants Circelli and Rainone, who were sitting in the driver and front passenger seats of the car respectively, were each asked for identification. Rainone gave his name and address but was unable to produce any proof of identity. Circelli handed Officer Stack a copy of a traffic citation containing his name. Defendant Rainone then told Officer Guzlas that he was related to the owner of Mario's Pizza. At this point the accounts differ. Officer Guzlas testified that Mr. Rainone stated that he and Circelli were supposed to meet that relative in the parking lot at a quarter to three. Rainone testified, however, that he had come to see if his uncle or cousin was still in the restaurant in order to show Circelli the interior.

Officer Guzlas asked the defendants to step out of the car and he and Officer Stack performed pat-down searches. Nothing was discovered. Prior to allowing the defendants to return to the car, Officer Guzlas went to the car, looked on the front seat, the back seat, on the floor of the front seat and under the front seat and saw nothing. Reaching under the passenger side of the front seat, Guzlas felt what appeared to be a bludgeon or club. He pulled it out and discovered two sticks of dynamite connected with some type of fuse or blasting cap. Defendants were then arrested.

It was further established at the suppression hearing that at no time prior to discovery of the bomb were defendants under arrest, that none of the officers had their guns drawn at any time, and that at all times defendants were as respectful as could be expected under the circumstances.

II.

Our decision on the motion to suppress requires a consideration of the legality of three stages of the officers' actions: 1) the initial stop of defendants' vehicle; 2) the pat-down search of defendants; and 3) the search of the automobile. Our discussion of these issues must, of course, begin with *Terry v. Ohio*, 392 U.S. 1 (1968), in which the Supreme Court held that pat-down searches pursuant to "stop and frisk" procedures were not violative of the Fourth Amendment provided that the officer had objectively reasonable grounds to believe that his safety or that of others was in danger, even though such belief or suspicion constituted less than probable cause for arrest. Although the Court in *Terry* expressly declined to decide whether facts not amounting to probable cause could justify an "investigative seizure" short of an arrest, 392 U.S. at 19 n.16, it later held, in *Adams v. Williams*, 407 U.S. 143, 145-46 (1972), that "[a] brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time."

The parameters of automobile stops were formulated in a series of cases dealing with border searches. *See, e.g., United States v. Martinez-Fuerte*, 428 U.S. 543 (1976); *United States v. Ortiz*, 422 U.S. 891 (1975); *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975); *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973). In *Brignoni-Ponce*, the Court established the principle that a vehicle may be stopped for questioning of the occupants when an officer has specific articulable facts which, taken together with rational inferences from those facts, reasonably warrant suspicion of criminal conduct on the part of the occupants. Moreover, lower courts have extended this position to non-border situations. *See, e.g., United States v. Montgomery*, 561 F.2d 875 (D.C. Cir. 1977); *see also United States v. Mahone*, 537 F.2d 922, 925 (7th Cir. 1976); *United States v. Catalano*, 450 F.2d 985 (7th Cir. 1971).

We think it clear that Officers Swanson and Guzlas, observing a car proceeding slowly with its headlights off in the parking lot of a closed business at 3:00 a.m., had the right, under *Terry* and *Brignoni-Ponce*, to make an investigative stop of defendants' car.[1]

We turn next to the pat-down search of defendants, and again we must determine whether the action of the officers was, from an objective standpoint, reasonable.[2] Officers Stack and Guzlas approached the vehicle, observing two men within. The driver was unable to produce any identification other than a traffic citation bearing his name. The passenger had no identification whatsoever, but stated that he was related to the owner of Mario's Pizza, and, depending upon whether Officer Guzlas' or defendant Rainone's version of the facts is accepted, the defendants were either waiting to meet Rainone's relative for a 3:00 a.m. rendezvous, or were checking to see whether the relative was working late at the pizza parlor. We find either version to be at least dubious. Even disregarding the unlikelihood of the 3:00 a.m. meeting in either story, neither account explains defendants' two mile an hour cruising or the fact that the car's headlights were off.

We find the circumstances of the situation, the lateness of the hour, the lack of identification, the inadequacy of defendants' answers, sufficiently suspicious to warrant a man of reasonable caution in the belief that defendants might be carrying some type of weapon. Pursuant to our questioning, Officer Guzlas stated that it was not his policy to ask every person to get out of his or her car for a pat-down search. As we stated at the hearing:

> You may interrogate them, If you don't get adequate answers, if they don't say, this is my girl, we are just out on a date and we are looking for a place to park, and I am sorry you can't park here and that is the end of it, but if the interrogation leaves unanswered questions, like no ID, and a traffic ticket is the only identification the other passenger has, or the driver has, and then they can ask him to step out. They can pat him down and they can interrogate him. (Tr. 96)

We turn, therefore, to the final stage of the confrontation, Officer Guzlas' search of the car prior to allowing the defendants to return, The rationale for this action came out during our questioning of the officer:

> The Court: Why did you decide to search the vehicle?
>
> The Witness: As a matter of routine, sir, before putting them back in the car.
>
> The Court: Routine, without any cause to believe there is anything in the vehicle, you searched it. You don't have anybody who was fleeing from a

---

[1] We have, from the commencement of this proceeding, considered Officers Swanson's and Guzlas' actions to be a forceable stop within the meaning of a Fourth Amendment seizure and not simply "the liberty (again, possessed by every citizen) to address questions to other persons, for ordinarily the person addressed has an equal right to ignore his interrogator and walk away." *Terry, supra*, 392 U.S. at 32-33 (Harlan, J., concurring). The Supreme Court has noted, however, that the "practice of stopping automobiles briefly for questioning has a long history evidencing its utility and is accepted by motorists as incident to highway use." *Martinez-Fuerte, supra*, 428 U.S. at 561 n.14.

[2] Based on the facts adduced at the suppression hearing, we do not consider the request of the officers that defendants leave the vehicle to be a stage separate from the pat-down search in our consideration of possible violations of defendants' Fourth Amendment rights. It is apparent to us that defendants were not asked to step out of the car to facilitate questioning and then, upon the raising of additional elements of suspicion, subjected to the frisk. Rather, as Officer Guzlas testified:

> Q. Were they under arrest when you asked them to get out of the car?
>
> A. No, sir.
>
> Q. Did you ask them to get out of the car so you might search them?
>
> A. Pat down search, yes, sir. (Tr. 61)

We need not, therefore consider the propriety of an extension of *Pennsylvania v. Mimms*, ... U.S. ....., 98 S.Ct. 330, 333-34 n.6 (1977), which holds "only that once a motor vehicle has been lawfully detained for a traffic violation, the police officers may order the driver to get out of the vehicle without violating the Fourth Amendment's proscription of unreasonable searches and seizures."

crime. You don't have any evidence that a crime has been recently committed. You don't have any reason to believe that these are criminals. You don't have any reason to believe that they have any contraband in the car, and you pat them down, they don't have any weapons on them.

You still go ahead and search every car you stop and somebody gets out, and you don't have any justification for being suspicious about anything?

The Witness: Well, if I was suspicious enough for a pat-down, I continue my search for weapons into the immediate area of the driver and passenger for my own safety.

It is nothing personal with the driver or passenger. Just no sense in me patting them down outside, and letting them get back into a weapon accessible once I turn my back.

That is just a matter of survival, sir. (Tr. 78)

The parties have argued that the question of an automobile search following an unfruitful *Terry* frisk is one of first impression. Our own research has discovered only one case with somewhat similar circumstances, *United States v. Ragsdale*, 470 F.2d 24 (5th Cir. 1972). In *Ragsdale*, defendant was stopped by two officers for speeding. After asking defendant to get out of the car, one officer, Officer Jones, observed part of a pistol protruding from a paper bag on the floorboard. He then frisked defendant, who was unarmed. His partner, Officer Mullens, had not observed the gun and did not hear his partner's whisper to him about it, but, prior to allowing defendant to return to the car, began a search of the automobile and discovered the pistol.[3] The court

[3] The officer's reasons for the search were quite similar to those expressed to us:

Q. You returned to the defendant's car to search as a safety precautionary search?
A. Yes, yes, sir.
Q. In order that when he returned to his automobile and might be mad at you, he wouldn't shoot you or something?

(Footnote continued on following page)

in that case held that, inasmuch as Officer Jones, having seen the gun, would have searched the car in any event, it did not matter that the officer who actually performed the search did not see it. In dictum, however, the court noted that "to hold that Mullens could search based only on what he knew seems to stretch beyond the limits of the cases which have applied the general rule laid down in *Terry*." 470 F.2d at 29 n.7.

We expressed our opinion at the suppression hearing that a limited search of the immediate area of the automobile in which defendants were sitting following the *Terry* frisk was a logical extension of *Terry*. We agree with the Fifth Circuit in *Ragsdale*, however, that it is an extension, and one not justified under present Supreme Court standards, despite the "continuing evisceration of Fourth Amendment protections against unreasonable searches and seizures." *See Martinez-Fuertes, supra*, 428 U.S. at 567 (Brennan, J., dissenting). Defendants were respectful in their actions while leaving the car and submitting to the pat-down searches and nothing was found on them in the course of the frisks. At that point, the purposes of *Terry* had been satisfied and, in the absence of any additional facts or inferences raising suspicion, the further search, without warrant or probable cause, was in violation of the Fourth Amendment. We therefore grant defendants' motions to suppress.

An appropriate order will enter.

/s/ HUBERT L. WILL
United States District Judge

DATED JUNE 21, 1978

[3] *continued*
A. That or otherwise, yes, sir.
Q. That is the way it goes. Was there any other reason?
A. None that I knew of.

470 F.2d at 26.

APPENDIX B

(Opinion Of November 9, 1978)

In the

United States Court of Appeals

For the Seventh Circuit

No. 78-1820

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

v.

MARIO RAINONE and ROCCO CIRCELLI,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 78-CR-33-1—**Hubert L. Will**, *Judge.*

ARGUED SEPTEMBER 13, 1978—DECIDED NOVEMBER 9, 1978

Before PELL, *Circuit Judge*, NICHOLS, *Judge*,* and SPRECHER, *Circuit Judge.*

SPRECHER, *Circuit Judge.* The issue presented in this case is whether a "stop and frisk" performed by a police officer under the conditions set out by *Terry v. Ohio*, 392 U.S. 1 (1968), may properly be extended to a limited search of the vehicle in which the suspect was riding. We conclude that, in the circumstances presented by this case, it may and accordingly reverse the district court's order granting the defendants' motion to suppress.

* Honorable Philip Nichols, Jr., Associate Judge, United States Court of Claims, is sitting by designation.

I

At approximately 3:00 a.m. on the morning of January 17, 1978, two deputy officers of the DuPage County Sheriff's Office, David Swenson and Dennis Guzlas, observed a car with its headlights extinguished proceeding slowly through a parking lot next to a pizza parlor known as Mario's Pizza. The pizza parlor was closed, and, except for some illumination from a nearby used car lot, the parking lot was dark. The deputy sheriffs drove into the parking lot to investigate these obviously suspicious circumstances. They were followed by a squad car driven by Officer Gene Stack, from the West Chicago Police Department, who happened to be cruising in the area.

All three officers left their squad cars and approached the suspicious vehicle. Stack went to the driver's side; Guzlas and Swenson went to the otherside. Guzlas asked the occupants of the car, defendants Circelli and Rainone, for identification and an explanation of their presence in the parking lot. Although both gave their names, only Circelli, who was seated in the driver's seat, could produce any identification. The explanation for their unusual behavior given to Officer Guzlas is in dispute. Guzlas testified that the defendants told him that they were related to the owner of the pizza parlor and were supposed to meet him in the parking lot. Defendant Rainone testified, on the other hand, that he told Guzlas that while en route home he had seen lights on in the pizza parlor and told Circelli to pull into the parking lot so that they could see whether his uncle, who often stayed late preparing for the next day, was there, in which case he would show Circelli the restaurant. At this point Stack, having heard Rainone say he was related to the owner of the pizza parlor, told Guzlas that the owner of the parlor was involved in an intra-family feud, that there had been some threats of violence and thus that "there may be some danger involved here with these particular individuals due to the circumstances within the family." (Transcript, April 4, 1978, at 76).

Guzlas then ordered the defendants out of the car. Both defendants were given "pat-down" searches, and

nothing was found. Officer Guzlas then left Rainone at the back fender of the car, where he had searched him, and engaged in a quick search of the car, glancing at the front seat, the back seat and the floor of the passenger compartment. Seeing nothing, he placed his hand under the front seat and felt an object which he thought at first was a billy club or night stick. Upon removing the object he discovered that it was instead some dynamite and a detonation device. Both defendants were then immediately arrested. Subsequently the Grand Jury returned a two-count indictment charging the defendants with possession of an unregistered destructive device and with a conspiracy to destroy the pizza parlor.

The defendants moved to suppress the evidence of dynamite possession. The district court found that the original stop of the car was a proper "investigative seizure," reasoning that the officers' reasonable suspicion of criminal conduct satisfied the Fourth Amendment, even though that suspicion would not have constituted probable cause to arrest. Similarly, the pat-down of the defendants was scrutinized under the standards set forth in *Terry* and was found to have been constitutionally permissible given the officers' reasonable belief that the defendants might have been armed.[1] The district court, however, declined to extend this rationale to permit a search of the vehicle itself. Although the

[1] The district court held that this belief could reasonably be founded on the facts that it was late at night, that one suspect had no identification and that the suspects' explanation for their behavior was inadequate. Although these facts certainly lead to a reasonable suspicion that the men were likely to be engaged in criminal activity, it does not lead to the conclusion that they were likely to be armed. It is equally likely that the defendants were engaged in an illicit activity, such as the use or sale of drugs, where weapons are usually not involved. The record, however, supplies two additional crucial facts which support the reasonability of the belief that the defendants were armed: first, the defendant's claim that he was related to the restaurant owner and, second, Officer Stack's report that the owner had been engaged in intra-family feuding marked by threats of violence.

court admitted that it was impressed by the reasons of the officer in making the search of the automobile, it felt that *Terry* was not subject to such an extension since its rationale—the protection of the investigating officer—was satisfied by the pat-down. Accordingly, the motion to suppress was granted, and the government appeals this order under 18 U.S.C. § 3731 (1976). The district court's determinations that the automobile stop and the frisk of the defendants were permissible have not been challenged. The issue before us is limited to the validity of the search of the automobile.

II

In *Terry v. Ohio*, 392 U.S. 1 (1968), the Supreme Court announced a principle designed to accommodate the constraints of the Fourth Amendment to the protean variety of investigative encounters between police and ordinary citizens. That decision subjected the police officer's decision to detain momentarily a suspect for investigative questioning to a standard of reasonableness, a standard lower than that of probable cause to arrest. Given a legitimate detention under this standard, the Court permitted police officers to engage in a search for weapons on the person of the suspect "where he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for the crime." 392 U.S. at 27.

The issue here, however, is not whether the investigative stop and pat-down of the defendants was justified under the standards set out in *Terry* but is whether the scope of this search could be extended to the nearby automobile in which the defendants had been riding and to which they would return. The guidelines for the permissible scope of a protective search are clearly set out in *Terry*. Since the sole rationale for the search is the discovery of weapons, the search "must therefore be confined in scope to an intrusion reasonably designed to discover guns, knives, clubs or other hidden instruments for the assault of the police officer." 392 U.S. at 29. The search of the pedestrian in *Terry*, accord-

ingly, was permissible because it consisted solely of a pat-down of the outer clothing of the suspect and thus was "confined . . . strictly to what was *minimally necessary* to learn whether the men were armed. . . ." 392 U.S. at 30 (emphasis added).

Obviously in a sidewalk encounter with a pedestrian, such as occurred in *Terry*, the officer's need to protect himself from dangerous weapons is fully satisfied by a pat-down of outer clothing of the suspect. However, where the suspect is driving an automobile, a pat-down of the outer clothing may not be sufficient to assure the safety of the police officer. In those cases there is the real possibility that a weapon may have been secreted in a part of the automobile readily accessible to the suspect. This is particularly true where the suspect remains in the car,[2] but is also true even where the suspect has been removed from the car. In the latter instance there is still a risk that the suspect may break away or that he may have a motive to kill the officer even after returning to his car.[3] Thus, it is clear that the rationale of *Terry*—the protection of the investigating officer and others nearby—permits the officer to make a search of the automobile limited to what is minimally necessary to uncover weapons to which the suspect will have easy access.

The scope of the search in the case before us was clearly restricted to these permissible limits. Officer Guzlas merely looked inside the car and placed his

[2] It should be noted that several authorities on police procedure recommend that, for the safety of the investigating officer, the suspect not be allowed to leave the car. *See* V. FOLLEY, POLICE PATROL TECHNIQUES and TACTICS 95 (1973); A. YOUNT, VEHICLE STOPS MANUAL, MISDEMEANOR AND FELONY 2-3 (1976). *See also Pennsylvania v. Mimms*, 434 U.S. 106, 119-20 n.10 (1977) (Stevens, J., dissenting).

[3] This would be the case where the defendant has engaged in criminal activity which he believes will be later discovered. Since the police officer, motivated by his suspicions of such conduct, has learned the suspect's identity, he will often be able to connect the suspect to the later discovered crime, thereby providing the motive for the suspect to eliminate a potential witness.

hands under the front seat. He did not open the trunk or the hood or look under the back seat or chassis. Further, Officer Guzlas removed the object from under the front seat only after determining that it felt like a weapon such as a billy club or night stick.

Only three other cases have discussed the applicability of the *Terry* rationale to automobile searches incident to a momentary detention not leading to a custodial arrest.[4] The first of these is *United States v. Green*, 465 F.2d 620 (D.C. Cir. 1972). In *Green* the police observed the defendant's vehicle travel at an excessive speed and run a stop sign. As a result the officers pursued the vehicle to make a routine traffic stop. As they approached the vehicle they noticed the defendant making "furtive gestures" which gave them the impression that he was armed. After stopping the vehicle, the defendant was ordered out of the car, whereupon he was frisked. Thereafter one of the officers reached under the driver's seat of the car and recovered a fully-loaded pistol. The court upheld the admissibility of the pistol into evidence. It reasoned that the furtive gestures had given the police officers sufficient reason to believe that the suspect was armed and that therefore a protective search was justified

[4] The government cites numerous cases involving custodial arrests, *e.g.*, *United States v. Thweatt*, 433 F.2d 1226 (D.C. Cir. 1970); *United States v. Robinson*, 414 U.S. 218 (1973); *United States v. Moore*, 554 F.2d 1086 (D.C. Cir. 1976). Since the Supreme Court has apparently held that automobiles driven by arrestees may be searched under the rubric of searches incident to arrest, these cases are inapposite. *See Adams v. Williams*, 407 U.S. 143, 149 (1972).

The defendants cited, in oral argument, *United States v. Stevie*, 23 CRIM. L. REP. (BNA) 2489 (8th Cir. August 15, 1978). This case also involved a search incident to a custodial arrest. In that case the court applied the prohibition of *Chadwick v. United States*, 433 U.S. 1 (1977), against searching an arrestee's luggage without a warrant where the luggage is in the exclusive control of the searching officers. We think the factor of the arrest in *Stevie* sufficiently distinguished this case. Even if it did not, however, certainly the level of control was different in the two cases. Since the defendants were to be returned to the car, the car was not in the exclusive control of the officers in the same manner that the luggage of the arrestees in *Chadwick* and *Stevie* was.

under the *Terry* rationale. As to the extension of the scope of the search to include the automobile, the court stated that the protective purposes of *Terry* permitted the search to extend to areas within the immediate control of the driver. The court then noted:

> [t]he search conducted in the instant case was sufficiently limited in scope to satisfy constitutional requirements. The officer first conducted a limited "frisk" for weapons upon the person of appellant. He then went to the car and recovered a fully-loaded pistol from under the driver's seat where he reasonably expected it to be. The officer did not search the trunk, glove compartment or back seat. His search was not general or exploratory, but rather limited to the danger at hand. The search under the driver's seat of an open-door vehicle to which the driver will return is a search of an area under the immediate control of the driver.

465 F.2d at 624-25. Finally, the court responded to the defendant's argument that a suspect who had been permitted to return to the car would pose no danger to the police by pointing out that there was always the likelihood that the suspect will escape and return to the car. The similarities of *Green* to the case before us are striking: in both cases the automobile search was preceded by a frisk of the driver who had been removed from the car and was limited in scope to discover only weapons within the easy access of the defendant. Thus, this case is persuasive authority for the extension of a *Terry* frisk to the nearby automobile.[5]

[5] *See also United States v. Wilkerson*, No. 77-1932 (D.C. Cir. July 26, 1978), which permitted a protective *Terry* search to extend to the suspect's automobile. The court noted:

> It takes little imagination to realize that an armed suspect might hide his weapon in a car before getting out in response to a police order. Thereafter standing next to the car without handcuffs, either the driver or one of the passengers could have bolted to it, seized a weapon and fire before the officers could find cover.

Slip op. at 8. This rationale is obviously applicable to the case before us, particularly given that here, as in *Wilkerson*, there were multiple suspects, unhandcuffed, in proximity to the car.

However, one of the other cases, *Government of Canal Zone v. Bender*, 573 F.2d 1329 (5th Cir. 1978), refused to allow the automobile search. Nonetheless, that case is readily distinguishable. In *Bender* two officers of the Panama Canal Zone Police noticed a car with its interior lights on parked in a remote area that had been a frequent site of drug use. Approaching the car, the officer asked the occupants what they were doing. The occupants replied that they were enjoying the view. Apparently there was no view of the Canal from the car, and thus the occupants were ordered from the car. The car was immediately searched for weapons and, although no weapons were found, a frisbee containing marijuana was retrieved from under the front seat. The Fifth Circuit reversed the defendants' conviction on the ground that the automobile search could not be justified by *Terry*. The court pointed out that neither defendant had been frisked prior to the automobile search, thereby completely defeating the protective rationale of *Terry* and thereby dispelling the possibility that the officers were indeed searching for weapons.

Although this fact effectively distinguishes *Bender* from the case before us, the remainder of the court's rationale is important to our discussion. The court noted that the officers had positioned themselves between the defendants and the car. Accordingly,

> [a]ny weapon which might have been hidden in the car would have been outside the reach of either suspect and could not have presented a danger to the officers while they were conducting their investigation. To allow the scope of a *Terry* search to extend outside the area of immediate control would be to sever the *Terry* exception from its rationale.

573 F.2d at 1332. Initially it should be pointed out that the court agrees that a *Terry* frisk is not limited to the pat-down of the outer clothing but extends to the area within the suspect's immediate control. The court, however, adopts what we believe to be an overly narrow view of immediate control. As we noted earlier, the car may come within the immediate control of the suspect if he makes an escape attempt, and it certainly will come within his immediate control when he is returned to it.

In conclusion, we do not view *Terry* searches as necessarily restricted to the outer clothing of the suspect. Instead, we hold that the scope of a legitimate *Terry* search may be extended to include areas within the immediate control and ready access of the detained suspect. The record before us indicates that the contested search was confined to such an area—in this instance, the surface of the front and back seats as well as under the front seat. Thus, given the uncontested legitimacy of the "stop and frisk" of the defendants, the search of the automobile was permissible. Accordingly, the dynamite discovered in that search should have been admitted.

REVERSED and REMANDED.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX C

(Order Of December 19, 1978 Denying Petition for Rehearing)

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

December 19, 1978

Before

Hon. WILBUR F. PELL, JR. *Circuit Judge*

Hon. PHILIP NICHOLS, JR., *Judge**

Hon. ROBERT A. SPRECHER, *Circuit Judge*

No. 78-1820

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

v.

MARIO RAINONE and ROCCO CIRCELLI,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 78-CR-33—**Hubert L. Will**, *Judge.*

On consideration of the petition for rehearing filed in the above-entitled cause by defendants-appellees, all of the judges on the original panel having voted to deny the same,

IT IS HEREBY ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

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* Hon. Philip Nichols, Jr., Associate Judge for the United States Court of Claims, is sitting by designation.

APPENDIX D

(Order Of December 26, 1978
Granting Motion For Stay Of Mandate)

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

December 27, 1978

Before

Hon. ROBERT A. SPRECHER, *Circuit Judge*

No. 78-1820

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

v.

MARIO RAINONE and ROCCO CIRCELLI,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 78-CR-33—**Hubert L. Will**, *Judge.*

This matter comes before the court on the "MOTION FOR STAY OF MANDATE PENDING APPLICATION FOR CERTIORARI" filed herein on December 21, 1978 by counsel for the defendants-appellees. On consideration thereof,

IT IS ORDERED that the mandate of this court is hereby STAYED until January 26, 1979, in accordance with Rule 41(b) of the Federal Rules of Appellate Procedure.

Supreme Court, U.S.
FILED
MAR 16 1979
..., JR., CLERK

No. 78-1134

In the Supreme Court of the United States

OCTOBER TERM, 1978

MARIO RAINONE AND ROCCO CIRCELLI, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

KATHERINE WINFREE
Attorney
Department of Justice
Washington, D.C. 20530

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 8a-16a) is reported at 586 F. 2d 1132. The opinion of the district court (Pet. App. 1a-7a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on November 9, 1978. A petition for rehearing was denied on December 19, 1978 (Pet. App. 17a). The petition for a writ of certiorari was filed on January 18, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the limited weapons search of petitioners' automobile was justified under the principles of *Terry* v. *Ohio*.

STATEMENT

An indictment filed in the United States District Court for the Northern District of Illinois charged petitioners with possession of an unregistered dynamite bomb, in violation of 26 U.S.C. 5861(d), and conspiracy to possess the bomb and to use it to destroy a building used in an activity affecting interstate commerce, in violation of 18 U.S.C. 371. The district court granted petitioners' pretrial motion to suppress (Pet. App. 1a-7a). The court of appeals reversed (Pet. App. 8a-16a).

The facts adduced at the suppression hearing show that at approximately 3:00 a.m. on January 17, 1978, two local police officers were driving down a side street in West Chicago, Illinois. They saw an automobile with its headlights off moving very slowly through a parking lot next to a restaurant. The restaurant was closed, and, except for some illumination from a nearby used car lot, the parking lot was dark (Tr. 15-18, 31-32, 42-43, 52-54, 68-69).[1] The officers drove into the parking lot to investigate, followed by another officer who had been cruising the area in a squad car (Tr. 18-19, 54-55, 73). The three officers left their vehicles and approached the automobile. They asked petitioners to identify themselves and to explain their presence in the parking lot. Although both supplied their names, petitioner Rainone was unable to produce any identification and petitioner Circelli produced only a traffic citation bearing his name (Tr. 24, 57-60, 75). Petitioner Rainone told the officers that he was related to the owner of the restaurant (Tr. 75, 103).[2] At that point, one of the officers told the other two that

[1] "Tr." refers to the transcript of the April 4, 1978, suppression hearing.

[2] Petitioner Rainone's explanation was subject to some dispute. According to one of the officers, petitioner Rainone explained that he and petitioner Circelli were supposed to meet the owner in the parking lot at 2:45 a.m. (Tr. 75). Petitioner Rainone, by contrast, maintained that he told the officer that he and Circelli had driven by the restaurant on their way home and entered the parking lot to see whether his uncle, who often worked late, was still there so that Rainone could show Circelli the restaurant (Tr. 103-104).

the owner of the restaurant was involved in an intra-family feud marked by threats of violence and warned that in light of those circumstances petitioners might be dangerous (Tr. 76-77). Upon request, petitioners got out of the car and were subjected to pat-down searches. No weapons were discovered (Tr. 24-27, 61-64, 77). Before allowing petitioners to re-enter the automobile, one of the officers looked into the car, quickly scanning the front and rear seats and the front floor (Tr. 65). Seeing nothing, he placed his hand under the front seat and felt an object that he believed to be a bludgeon or club (Tr. 79-80). He removed the object, which proved to be two sticks of dynamite and a fuse (Tr. 49-51, 65, 80-81). Petitioners were then arrested (Tr. 81).

2. Petitioners moved to suppress the evidence seized from the automobile on a variety of grounds. The district court found that the circumstances justified the investigatory stop of the vehicle, the request that petitioners get out of the car, and the subsequent pat-down search (Pet. App. 4a). The district court held, however, that the limited search of the automobile was unlawful (Pet. App. 7a). It therefore granted petitioners' motions to suppress the dynamite discovered in the course of that search (*ibid.*).

The government appealed, and the court of appeals reversed. It held that the scope of a legitimate *Terry* search may be extended to include areas within the immediate control and ready access of the detained suspect. Because the search in this case was confined to such an area, the court held that it was reasonable under the rationale of *Terry* (Pet. App. 16a).

ARGUMENT

1. The judgment of the court of appeals is not final. The petition challenges not a conviction, but merely the court of appeals' reversal of the district court's pretrial suppression order. That reversal, however, places petitioners in the same position that they would have been in if the district court had ruled against them in the first instance. Since such a ruling would not have been subject to interlocutory appeal (see *DiBella* v. *United States*, 369 U.S. 121, 124 (1962); *Cobbledick* v. *United States*, 309 U.S. 323, 325-326 (1940)), review of the court of appeals' decision at this time would be premature. At trial petitioners may be acquitted, in which case their claim will be moot. If, on the other hand, petitioners are convicted and the convictions are affirmed on appeal, they will then be able to present all their contentions to this Court by way of a petition for certiorari seeking review of the final judgment against them.

2. In any event, the court of appeals correctly determined that the limited search of the automobile was justified under the circumstances of this case.

The district court properly concluded (Pet. App. 4a-5a) that the circumstances justified the initial investigatory stop of the automobile (see *Adams* v. *Williams*, 407 U.S. 143 (1972); *United States* v. *Brignoni-Ponce*, 422 U.S. 873 (1975)), the request that petitioners step out of the car (see *Pennsylvania* v. *Mimms*, 434 U.S. 106 (1977)), and the pat-down search of their persons (see *Terry* v. *Ohio*, 392 U.S. 1 (1968)). Petitioners do not challenge the validity of those rulings. Instead they argue only (Pet. 5-9) that after the frisk produced no weapons or probable cause to arrest, the scope of the protective search under the principles of *Terry* and its progeny could not be extended to the car.

As this Court observed in *Terry*, the justification for such a search "is the protection of the police officer

and others nearby, and it must therefore be confined in scope to an intrusion reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police officer" (392 U.S. at 29). In *Terry*, the search was held lawful because it consisted solely of a pat-down of the outer clothing of the suspect and thus was "confined * * * strictly to what was minimally necessary to learn whether the men were armed * * *" (*id.* at 30). But, as the court of appeals properly noted (Pet. App. 16a), *Terry* searches are not "necessarily restricted to the outer clothing of the suspect." Rather, the precise limitation on such searches must "be developed in the concrete factual circumstances of individual cases." *Terry* v. *Ohio*, *supra*, 392 U.S. at 29.

In a sidewalk encounter with a pedestrian, such as that in *Terry*, the officer's need to determine the presence of dangerous weapons is fully satisfied by a frisk of the outer clothing of the suspect. Where the suspect is a motorist, however, a pat-down of his outer clothing may not be sufficient to assure the officer's safety. In such cases, a weapon may have been secreted in a part of the automobile readily accessible to the suspect. While the potential for danger is especially great where the suspect remains in the car, it is substantial even where he has been removed from it, since there is still a risk that he may harm the officer after returning to his vehicle.[3] See Pet.

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[3]A colloquy between the district court and one of the arresting officers in this case makes the point well (Tr. 78):

The Court:	Why did you decide to search the vehicle?
The Witness:	As a matter of routine, sir, before putting them back in the car.
The Court:	Routine, without any cause to believe there is anything in the vehicle, you searched it. You

App. 12a n.2. Thus, as the court of appeals correctly held (Pet. App. 12a-13a):

> [I]t is clear that the rationale of *Terry*—the protection of the investigating officer and others nearby—permits the officer to make a search of the automobile limited to what is minimally necessary to uncover weapons to which the suspect will have easy access.
>
> The scope of the search in the case before us was clearly restricted to these permissible limits. Officer Guzlas merely looked inside the car and placed his hands under the front seat. He did not open the trunk or the hood or look under the back seat or chassis. Further, Officer Guzlas removed the object from under the front seat only after determining that if felt like a weapon such as a billy club or night stick.

> don't have anybody who was fleeing from a crime. You don't have any evidence that a crime has been recently committed. You don't have any reason to believe that these are criminals. You don't have any reason to believe that they have any contraband in the car, and you pat them down, they don't have any weapons on them.
>
> You still go ahead and search every car you stop and somebody gets out, and you don't have any justification for being suspicious about anything?
>
> The Witness: Well, if I was suspicious enough for a pat-down, I continue my search for weapons into the immediate area of the driver and passenger for my own safety.
>
> It is nothing personal with the driver or passenger. Just no sense in me patting them down outside, and letting them get back into a weapon accessible once I turn my back.
>
> That is just a matter of survival, sir.

Cf. *United States* v. *Wilkerson*, No. 77-1932 (D.C. Cir. July 26, 1978), slip op. 8; *United States* v. *Santana*, 485 F. 2d 365, 368-369 (2d Cir. 1973), cert. denied, 415 U.S. 931 (1974); *United States* v. *Green*, 465 F. 2d 620, 624-625 (D.C. Cir. 1972).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

KATHERINE WINFREE
Attorney

MARCH 1979

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